No. 91-701

Supreme Court, U.S.
FILED
OCT 25 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF ILLINOIS,
Petitioner,

vs.

JOHN P. KELK,
Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Fourth Judicial District

PETITION FOR WRIT OF CERTIORARI

ROLAND W. BURRIS
Attorney General, State of Illinois

ROSALYN B. KAPLAN
Solicitor General, State of Illinois

TERENCE M. MADSEN
Assistant Attorney General
Counsel of Record
100 W. Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-2235

Counsel for Petitioner

Of Counsel:

John W. Turner
State's Attorney, Logan County
Logan County Courthouse
Lincoln, Illinois 62656
(217) 732-2184

Kenneth R. Boyle, Director
Robert J. Biderman, Deputy Director
State's Attorneys Appellate Prosecutor
151 Bruns Lane, Suite 103
Springfield, Illinois 62702
(217) 782-8076

Printed by Authority of the State of Illinois (P.O. 35253—60—10-25-91)

QUESTION PRESENTED FOR REVIEW

Whether a lawfully arrested motorist's consent to look inside his car for drugs extends to a search of a duffle bag lying on the floor of the vehicle.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI	5
RESPONDENT'S CONSENT TO LOOK IN THE CAR FOR DRUGS EXTENDED TO A SEARCH OF A DUFFLE BAG LYING ON THE FLOORBOARD, IN VIEW OF THE RECENT DECISION IN *FLORIDA v. JIMENO*	5
CONCLUSION	8

APPENDIX

	APP. PAGE
A—Slip Opinion of the Appellate Court of Illinois, Fourth Judicial District (No. 4-90-0383, announced January 29, 1991), *People v. Kelk*, 208 Ill.App. 3d 313, 566 N.E.2d 835 (4th Dist. 1991)	1a
B—Order of the Illinois Supreme Court denying leave to appeal (No. 71566, date June 5, 1991) .	7a
C—Order of the Illinois Supreme Court denying motion for reconsideration (July 30, 1991) ..	8a

TABLE OF AUTHORITIES

Cases

Florida v. Jimeno, ____ U.S. ___, 111 S.Ct. 1801 (decided May 23, 1991) 5, 6, 7

United States v. Berke, 930 F.2d 1219 (7th Cir. 1991) 7

Constitutional Provision

U.S. Const., Amendment IV 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF ILLINOIS,

Petitioner,

vs.

JOHN P. KELK,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Fourth Judicial District

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Appellate Court of Illinois, Fourth Judicial District, affirming an order suppressing evidence, is reported at 208 Ill.App.3d 313, 566 N.E.2d 835 (4th Dist. 1991). (Appendix A) The Illinois Supreme Court denied the People's petition for leave to appeal on June 5, 1991. (Appendix B) The People's motion for reconsideration was denied by the Illinois Supreme Court on July 30, 1991. (Appendix C)

JURISDICTION

The opinion of the Appellate Court of Illinois, Fourth Judicial District, was filed on January 29, 1991. The Supreme Court of Illinois denied petitioner leave to appeal on June 5, 1991. A motion by petitioner for reconsideration was denied by the Supreme Court of Illinois on July 30, 1991.

This Court's jurisdiction is invoked under 28 U.S.C. sec. 1257(3). The instant petition is being filed within 90 days of the denial of petitioner's motion for reconsideration by the Illinois Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A two-count information was filed on December 28, 1989, charging respondent John Kelk with violations of Ill.Rev.Stat., Ch. 56½, secs. 704(d) and 705(d) (1989). Count I alleged that on December 27, 1989, respondent was on I-55 in Logan County, Illinois, and had in his possession between 30 and 500 grams of cannabis. (R. Vol. I, C6) Count II alleged that on December 27, 1989, on I-55 in Logan County, respondent had in his possession with intent to deliver between 30 and 500 grams of cannabis. (R. Vol. I, C7)

Respondent filed a motion to quash arrest and suppress evidence. At a hearing on the motion, respondent testified that he was pulled over by a state trooper about 2:50 p.m. on December 27, 1989. He was issued warning tickets for a loud muffler and improper lane usage. (R. Vol. II, 7) Respondent testified that the trooper asked him if he would "care if he looked in my car." Respondent said that he told him no. Respondent described his car as a 1970 Volkswagen square-back station wagon that did not have a trunk. The officer told respondent while he was still in the car to step around and stand by the front of the car. The officer then went to the other side of the car and began looking in a duffle bag. Respondent testified that the officer did not ask for permission to search his duffle bag or personal belongings and he did not give his permission to search. (R. Vol. II, 8) The officer did not have an arrest warrant for respondent or a search warrant for the car. Respondent testified that when the officer asked if he could look in the vehicle that he did not realize the officer was going to search his suitcase. (R. Vol. II, 9)

On cross-examination, respondent said the officer did not tell him he wished to look in the vehicle to determine if there were drugs or weapons present. However, respondent next answered that the officer asked him if there were drugs or weapons in the vehicle, and that this question was just before the question if the officer could have a look. (R. Vol. II, 10) Respondent testified that the officer's exact words were "Are you carrying any drugs?" and that he replied, "No." The officer then asked, "Do you care if I have a look?" (R. Vol. II, 11)

State Trooper Tim Becker testified that he had been assigned to a drug interdiction unit since September 1987. When he stopped respondent, he did not have any reason to believe the car contained evidence of a crime, and he did not have an arrest warrant or search warrant. (R. Vol. II, 12-13) Officer Becker did not ask respondent permission to search his personal belongings in the car or his duffle bag or suitcase. After he issued respondent the warning tickets and asked for permission to look in the car, he asked respondent to get out of the vehicle. (R. Vol. II, 14) Officer Becker said that he then went to the passenger side of the car for safety reasons because of traffic. On cross-examination, Officer Becker testified that he stopped respondent and issued warning tickets for the traffic offenses of improper lane usage and a loud muffler. (R. Vol. II, 15) The officer was then asked if he recalled exactly what language was used when he asked whether he could look in the car. The officer testified:

> I asked him if he had any drugs or weapons in the car. He replied no. I then asked if he cared if I looked inside of his car.
>
> Q. And his response to that was?
>
> A. No, he did not care.
>
> (R. Vol. XVI, 16)

Officer Becker asked respondent to step out and stand in front of the car, and then he went to the passenger side. He looked inside a red duffle bag and found two bags of suspected marijuana which he seized. (R. Vol. II, 16) Officer Becker believed the duffle bag was lying on the floorboard on the passenger side. (R. Vol. II, 17)

Finding the search of the duffle bag exceeded the consent to look in the car, the circuit court granted the motion to suppress. (R. Vol. I, C3-C5) The appellate court affirmed, and the Illinois Supreme Court denied the People's petition for leave to appeal. A motion for reconsideration in light of *Florida v. Jimeno* was denied by the Illinois Supreme Court on July 30, 1991.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORATI

RESPONDENT'S CONSENT TO LOOK IN THE CAR FOR DRUGS EXTENDED TO A SEARCH OF A DUFFLE BAG LYING ON THE FLOORBOARD, IN VIEW OF THE RECENT DECISION IN *FLORIDA v. JIMENO.*

The facts of this case are nearly identical to those in *Florida v. Jimeno,* ____ U.S. ____, 111 S.Ct. 1801 (decided May 23, 1991). Respondent Kelk was stopped on an interstate highway for both improper lane usage and a loud muffler. The officer asked respondent, "Are you carrying any drugs?" and he replied, "No." The officer then asked, "Do you care if I have a look?" The officer testified that Kelk responded, "No, he did not care." Respondent also testified that he answered, "No, I do not care." Thus no factual dispute exists on the sequence of

the questions and what was said. The officer then looked inside a red duffle bag lying on the floorboard on the passenger side of the car. Inside the duffle bag he found two bags of suspected marijuana.

In *Jimeno*, a police officer overheard the defendant arranging what appeared to be a drug transaction over a public telephone. Believing the defendant might be involved in illegal drug trafficking, the officer followed his car. He observed the defendant driving through a red light and stopped him to issue a traffic citation. The officer asked permission to search the car, stating he had reason to believe defendant was carrying narcotics. Jimeno said he had nothing to hide and consented to search of the automobile. The officer opened the passenger door, saw a brown paper bag on the floorboard, opened the bag, and found a kilogram of cocaine inside. The trial court suppressed the cocaine on the ground that defendant's consent to search the car did not include the closed paper bag. The Florida District Court of Appeal affirmed.

The United States Supreme Court reversed, finding the consent extended to the paper bag inside the car. The Court wrote:

> The scope of a search is generally defined by its expressed object. *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). In this case, the terms of the search's authorization were simple. Respondent granted Officer Trujillo permission to search his car, and did not place any explicit limitation on the scope of the search. Trujillo had informed respondent that he believed respondent was carrying narcotics, and that he would be looking for narcotics in the car. We think that it was objectively reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within that car which might

> bear drugs. A reasonable person may be expected to know that narcotics are generally carried in some form of a container. "Contraband goods rarely are strewn across the trunk or floor of a car." *Id.*, at 820, 102 S.Ct. at 2170. The authorization to search in this case, therefore, extended beyond the surfaces of the car's interior to the paper bag lying on the car's floor.

111 S.Ct. at 1804.

The factual setting here is remarkably similar. The trooper's request to "look in" the car must be considered in conjunction with his first question, "Are you carrying any drugs?" See *United States v. Berke*, 930 F.2d 1219 (7th Cir. 1991). And the scope of his search was limited to areas where the driver might reasonably be expected to be concealing drugs. In *Jimeno*, the narcotics were secreted in a paper bag on the floorboard. Here, the trooper discovered cannabis in a duffle bag on the floorboard. Certiorari should be granted because this case is governed by *Jineno*.

CONCLUSION

For the foregoing reasons, petitioner prays that this Court grant the instant Petition for Writ of Certiorari and, upon review, reverse the decision of the Appellate Court of Illinois in this case.

Respectfully submitted,

ROLAND W. BURRIS
Attorney General, State of Illinois

ROSALYN B. KAPLAN
Solicitor General, State of Illinois

TERENCE M. MADSEN
Assistant Attorney General
Counsel of Record
100 W. Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-2235

Counsel for Petitioner

Of Counsel:

John W. Turner
State's Attorney, Logan County
Logan County Courthouse
Lincoln, Illinois 62656
(217) 732-2184

Kenneth R. Boyle, Director
Robert J. Biderman, Deputy Director
State's Attorneys Appellate Prosecutor
151 Bruns Lane, Suite 103
Springfield, Illinois 62702
(217) 782-8076

APPENDICES

APPENDIX A

[Filed January 29, 1991]

No. 4-90-0383

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

JOHN P. KELK,

Defendant-Appellee.

Appeal from Circuit Court of Logan County, No. 89CF130
Honorable Gerald G. Dehner, Judge Presiding

JUSTICE McCULLOUGH delivered the opinion of the court:

On December 28, 1989, the defendant, John P. Kelk, was charged with possession of between 30 and 500 grams of cannabis in violation of section 4(d) of the Cannabis Control Act (Act) (Ill. Rev. Stat. 1989, ch. 56½, par. 704(d)) and possession with the intent to deliver between 30 and 500 grams of cannabis in violation of section 5(d) of the Act (Ill. Rev. Stat. 1989, ch. 56½, par. 705(d)). Defendant filed a motion to quash the arrest and suppress evidence, and a hearing on the moion to suppress was held March

22, 1990. On March 23, 1990, the trial court allowed the defendant's motion to suppress, and the prosecutor's motion to reconsider was denied on May 16, 1990. The issue on appeal is whether the defendant's consent to look in the car extended to a search of a duffel bag in the passenger compartment. We affirm.

The trial court in its March 23, 1990, ruling stated in part:

> "Based on the totality of the circumstances presented here, the Court cannot conclude that a reasonable person would believe contraband was present. Also, the search clearly appeared to have gone beyond the consent to look in the car."

At the hearing on the motion to reconsider, the trial court stated:

> "[T]he specific language used, *i.e.* 'look in the car,' is subject to interpretation and bears on the issue of voluntariness of consent and, especially, the scope of that consent. Once again, from its review of the totality of the circumstances and facts raised in this case, the Court concludes that the search here went beyond the consent given 'to look in the car.' "

Two witnesses were presented by the defendant at the motion to suppress, the defendant and the arresting officer. The actions taken by the officer which are subject of the motion are that he opened the passenger side of the vehicle and began to look in the defendant's duffel bag, finding cannabis.

Asked whether any tickets were issued after he was stopped by Officer Becker, defendant stated: "He issued me a warning for the loud muffler and improper lane usage." Defendant was then asked, "did you have a conversation with him?" The defendant responded, "He asked

if he could—would—if I would—if I cared if he looked at my car." The defendant responded, "I told him no." The defendant was then asked whether the officer asked permission to search the duffel bag or the defendant's personal belongings and the defendant responded, "No." On further response to the question, "Did you give him permission to search your duffle bag or your suitcase?" the defendant answered, "No." The defendant was allowed to answer why the defendant told the officer he could look in the vehicle, the defendant's response being, "I didn't realize that he was going to search my suitcase." On cross-examination, the defendant once again admitted that he gave the officer permission to "look in the vehicle."

State Trooper Becker was then called as a witness and he was asked the question, "Did you have any reason to believe that the car was used in the commission of a crime?" to which the officer responded, "No, I did not." He was then asked, "Did you have any reason to believe that the car contained any evidence of a crime?" and the officer answered, "No, I did not." He was asked, "Now, when you asked him to look into the car, you never used the word search. Is that right?" to which the officer answered, "No, I didn't." Further question, "You just asked him if he cared if you looked in the car." Answer, "Correct." The officer was then asked, "Did you ever ask him permission to search any of his personal belongings in the car?" and the officer answered, "No, I didn't." He was then asked, "Did you ever ask him if you could search the duffle bag or the suitcase that he had in his car?" and the officer answered, "No, I didn't."

Both the defendant and the arresting officer testified that the officer did ask the defendant "if there were any drugs or weapons on the vehicle?" The defendant responded,

"No." The officer testified that he did not believe that he patted the defendant down before he looked into the car.

People v. Corral (1986), 147 Ill. App. 3d 668, 498 N.E.2d 287, and *People v. Woolery* (1990), 193 Ill. App. 3d 892, 550 N.E.2d 616, are argued by the parties in support of their positions on appeal and were the cases used by the trial court in making its ruling to grant the motion to suppress. In *Corral*, as here, the trial court granted the defendant's motion to suppress. We stated, "Consent to a search must be voluntary, and the State has the burden of establishing voluntariness. [Citation.] Moreover, consent to a search 'waives the warrant requirement only to the extent granted by defendant in his consent.' " (*Corral*, 147 Ill. App. 3d at 674, 498 N.E.2d at 291.) In *Corral*, the trial court concluded that the defendant "consented only to an inspection of the truck's agricultural cargo." *Corral*, 147 Ill. App. 3d at 671, 498 N.E.2d at 290.

Also in *Corral*:

> "Police must obtain a search warrant prior to searching a motor vehicle, unless the circumstances fall within an exception to the warrant requirement. A search warrant need not be obtained if: (1) police have probable cause to believe that the vehicle was used in or contains evidence of a crime; (2) police obtain valid consent to the search; (3) police search the vehicle incident to a lawful arrest; or (4) the vehicle is lawfully impounded and an inventory search results." (*Corral*, 147 Ill. App. 3d at 672, 498 N.E.2d at 290.)

In *Woolery*, the defendant as in this case was asked if there was any alcohol or drugs in the auto and, after he replied no, the officer asked if he could search the vehicle. The defendant allegedly said, "Yeah, go ahead." (*Woolery*, 193 Ill. App. 3d at 893, 550 N.E.2d at 617.) The officer

searched the passenger compartment of the automobile and found no alcohol or drugs but did find some plastic baggies in a shaving kit. The officer then took the keys from the ignition, searched the trunk of the auto, and picked up a jacket from the trunk. At this time, the defendant exited the squad car and told the officer that he had given consent to search inside the vehicle and not the trunk. In *Woolery*, the trial court denied the motion to suppress. We found that the trial court could conclude "the initial consent could properly be interpreted by the officer as a consent to search the entire vehicle." *Woolery*, 193 Ill. App. 3d at 895, 550 N.E.2d at 618.

In *Woolery*, there was a conflict in the testimony and the trial court questioned the defendant's credibility and believed the officer's testimony. As we stated in *Woolery*:

> "The rule for determining is set forth in *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 248-49, 36 L. Ed. 2d 854, 875, 93 S. Ct. 2041, 2059:
>
> > "* * * [W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."
>
> The trial court's determination of the voluntariness of a consent is to be accepted on review unless its findings are clearly unreasonable. *People v. DeMorrow* (1974), 59 Ill. 2d 352, 358, 320 N.E.2d 1, 5. *People v. Sommer* (1977), 45 Ill. App. 3d 459, 460-61, 359

N.E.2d 1190, 1191." *Woolery*, 193 Ill. App. 3d at 895, 550 N.E.2d at 617-18.

In the case before us, both the defendant and the officer testified that the question asked the defendant was whether the officer could "look into the vehicle." The prosecutor argues the officer's two questions provided the scope of the consent to search: (1) are there any drugs or weapons in the car? and (2) do you care if I look inside the car? The trial court found that the defendant's consent to look into the vehicle did not include an authorization to the officer to inspect and open the duffel bag.

The words "look into" and "search" do not necessarily set the same parameters of a consent. In *People v. Shelton* (1982), 110 Ill. App. 3d 625, 628, 442 N.E.2d 928, 931, this court stated, "The question of the subject matter of the consent itself is a factual one (*People v. Cole* (1977), 53 Ill. App. 3d 711, 368 N.E.2d 1308) and will not be disturbed unless the conclusion below is against the manifest weight of the evidence." Here, it was a trial court call and the evidence presented does not require reversal.

Giving the required deference to the trial court's determination, we point out that in *Corral*, the court affirmed the trial court's determination to grant the motion to suppress; and in *Woolery*, this court affirmed the trial court's determination that the motion to suppress should be denied. Here, the trial court determined that the search exceeded the consent granted by the defendant. Upon review of the record, the determination of the trial court was not against the manifest weight of the evidence.

The circuit court of Logan County is affirmed.

Affirmed.

LUND, P.J., and STEIGMANN, J., concur.

APPENDIX B

[Letterhead Of]

STATE OF ILLINOIS
SUPREME COURT CLERK
SUPREME COURT BUILDING
SPRINGFIELD, 62706

June 5, 1991

No. 71566—People State of Illinois, petitioner, v. John P. Kelk, respondent. Leave to Appeal, Appellate Court, Fourth District. (4-90-0383)

Petition for leave to appeal denied.

APPENDIX C

[*Letterhead Of*]

STATE OF ILLINOIS
SUPREME COURT CLERK
SUPREME COURT BUILDING
SPRINGFIELD, 62706

July 30, 1991

Mr. Robert J. Biderman
State's Attorney
Appellate Prosecutor
151 Bruns Lane, Suite 103
Springfield, IL 62702

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 71566—People State of Illinois, petitioner, v. John P. Kelk, respondent.

The motion by petitioner for leave to file a motion for reconsideration of the order denying the petition for leave to appeal is *denied*.

JH:lgr
cc: AG/Crim
SA/Logan
Mr. Thomas J. Skryd